United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1107

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

RAYMOND THOMPSON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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STATEMENT OF THE CASE

Indictment 75 Crim. 5, and 74 Crim. 620* charged the Appellant, RAYMOND THOMPSON, and numerous others with conspiracy to distribute and possess with intent to distribute Schedule I and Schedule II narcotic drug controlled substances in violation of §812.841 (a)(91) and 841(b)(1)(a) of Title 21 of the United States Code.

Count one of the Indictment**, the conspiracy count, set forth thirteen overt acts, all of which related to cocaine transactions. The eight substantive counts charged various defendants, but not the Appellant, THOMPSON, with distributing cocaine.

The Appellant was found guilty of conspiracy on January 30, 1975 after Trial before the Honorable Robert L. Carter, D.J. and a jury as were six other defendants.*** None of the defendants were found guilty on any of the substantive counts.

On March 4, 1975, Appellant was sentenced to five years in prison, three years special probation and a $5,000 fine.

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* A superseding Indictment filed on January 6, 1975. The original Indictment, which was filed on June 18, 1974, did not differ at all from the superseding Indictment insofar as the Appellant was concerned.

**All references to the Indictment are to the superseding Indictment.

***The Appellants, Joseph DeLuca, James Angley, James Capotorto, Raymond Thompson, Joseph Camperlingo and Louis Guerra. The jury acquitted eight defendants; Webster Bivens, Steven Crea, Joseph Lepore, Phillip Cimmino, Thomas Vasta, Susana Sherman, Anita Coraluzzo, and Nathaniel Arnold. It could not agree as to the Defendants, Marilyn Greco and Cathy Spangler, therefore, a mistrial was granted as to those two defendants.

Appellant was released on bail pending appeal.

This trial was a nine count narcotics conspiracy trial in which thirty persons were named as defendants.* The trial itself began on January 6, 1975, ended on January 30, 1975, and covered almost 3000 pages of transcript. Seventeen defendants ultimately proceeded to trial.**

The bulk of the testimony against each and every defendant in the above-mentioned Indictment was given by co-conspirator, Albert Rossi, Jr., the principal prosecution witness.

Rossi testified that he and the defendant, Ernest Coralluzzo were partners who bought and sold large quantities of cocaine from and to others. Rossi also testified as to other transactions involving heroin and marijuana.

The Indictment herein makes mention only of cocaine. Each and every overt act alleged to be in furtherance of the conspiracy charged involved only cocaine.

However, the Government introduced over the objection of, and to the great prejudice of the defendant's evidence of alleged heroin and marijuana transactions.

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*One unindicted co-conspirator, Louis Lepore, was named in the Indictment itself.

**The defendants, Ernest Coralluzzo, Albert Rossi, Jr., who testified for the Government, Robert Browning, Gerald Rubin, Charles Guida and Maria Marrero plead guilty prior to trial. The defendant, Peter Cosme was severed, the remainder of the defendants were never apprehended.

In its opening statement to the jury, the Government states:

> "This is a narcotics case. Obviously it is an important case. It involves dealings in narcotics by some 29 defendants during the whole year of 1973. The transactions included cocaine, marijuana and heroin." (Tr. P. 44)
>
> and
>
> "The conspiracy in this case involved, first of all, Ernest Coralluzzo and Albert Rossi, who were partners in the drug trade. They were associated in the drug trade with a gentlemen by the name of Louis Guerra. This particular conspiracy and drug related agreement and operation centered around the Arthur Avenue section in the Bronx. They dealt in all the major drugs: cocaine, marijuana and heroin.
>
> The evidence will show that they did not deal in street quantities of an ounce or a few grams. The evidence will show that they dealt in kilograms and in pound quantities." (Tr. P. 49).

During direct testimony, ROSSI testified about "ripping off" a doctor for 600 pounds of mannita with which to cut heroin. When Mr. Frankel, attorney for Thomas Vasta, objected to the introduction of this evidence on the grounds that this conspiracy only had to do with cocaine, (Tr. P. 18), the Government responded that:

> "Your honor, the conspiracy involves both heroin and cocaine and marijuana." (Tr. P. 18)
>
> THE COURT: "All right. Then the objection is overruled." (ibid)

The problem of delineating the parameters of "the conspiracy" continued throughout the trial. At Page 945 of the trans-

script, Mr. Lefcourt, attorney for the Defendant-Appellant, Guerra, states:

> "What is the conspiracy? That's what I am trying to find out. What is their definition of this conspiracy. Anything that any defendant is alleged to have done during the year 1973? Is that it? Aren't we to know what we are in effect charged with?

The Government responded:

> Mr. Lavin: "Mr. Lefcourt is trying to confuse the issue by asking a question that has no answer: What conspiracy are we talking about." (Tr. P. 947)

To Which the Court responded:

> "It has to have an answer or else we shouldn't be here." (ibid)

After questioning the Government in this regard, the Court states:

> "So that the parameters you have are any of the transactions in terms of narcotics in which Mr. Rossi was involved with any of these individuals from 1973 to the filing of the Indictment, June, 1974, in narcotics,including cocaine, heroin and marijuana, is part of the conspiracy is that right? (Tr. P. 948)
>
> Mr. Lavin: "Yes sir."

The Court allowed further evidence of marijuana transactions on the basis that "the conspiracy" involved marijuana when it allowed George Festa, a Special Agent, Drug Enforcement Administration, to testify that on May 3, 1973 he spoke to Joseph Camperlingo and on May 3 and 4, 1973 to the Appellant, RAYMOND THOMPSON, and Joseph Camperlingo in regard to a marijuana deal.

Mr. Festa went on to recount before the jury in detail

the smuggling procedure Mr. Thompson allegedly used in bringing narcotics into the United States.

By way of instructing the jury in regard to the May 3rd and May 4th conversations between Mr. Festa, Mr. Thompson and Mr. Camperlingo, the Court stated that:

> "These conversations are to be considered by you solely in respect of the two Defendants with whom the conversations were had, and they are to be considered by you in that context solely in respect of your determination of two things, as to whether as between Rossi and the two Defendants named a conspiracy existed as alleged in the indictment No. 1 and No. 2 as to whether the two Defendants were members of the conspiracy. These conversations are not to be considered by (you) in any respect in regard to any other defendant." (Tr. P. 1534)

Thereupon, the Court allowed tapes of these conversations to be played before the jury after first stating that:

> ". . .These conversations are not being admitted in furtherance of the conspiracy, in any event, and I gave instructions to the jury as to what the purpose of it was.
>
> These portions which do not deal with it, I gave instructions with respect to it." (Tr. P. 1552)

Even after the Government had rested and the defense had begun its presentation of its case, the Court itself appeared puzzled at the parameters of the instant Indictment.

> THE COURT: "My understanding is that the Government was contending that all of those transactions, even the so-called transaction with Mr. Cimmino, which involved heroin, and the transactions in cocaine and the transaction in marijuana, were subsumed under this Indictment. This is what I understood the Government's contention to be." (Tr. P. 2226)

Finally, the Court states, in regard to marijuana that:

". . . If the proof is only as to marijuana, then it seems to me that they have to acquit." (Tr. P.2228)

The Court explains its decision that the huge amount of evidence regarding marijuana are not prejudicial to the Appellant by stating:

THE COURT: "I don't regard any tons of marijuana as being prejudicial in terms of the present climate of opinion in this country. I don't regard that as prejudicial.

But that is another point. The fact of the matter is in some circles people regard it as not respectable unless you do smoke marijuana." (Tr. P. 2231)

Regardless of the attitude of people toward "tons of marijuana" or the smoking of marijuana, it is not until the court's charge to the jury that the jury is told that the conspiracy count concerns cocaine and heroin only. (Tr. P. 2732)

The Court further instructs the jury that:

"In the course of the trial, I permitted certain testimony that some of the Defendants on trial and others had engaged in transactions involving the purchase and sale of marijuana. This testimony was admitted as part of the Government's evidence concerning the conspiracy charged in the Indictment. If you believe the testimony about the marijuana transactions you may consider it in determing whether the conspiracy charged in the indictment existed.

That is to say, if you believe this testimony, you may consider it in determining whether there was an agreement or arrangement between two or more of these Defendants to distribute illegal substances.

But I caution you, in this case the charge in Count I is that the defendants conspired to distribute cocaine and heroin. As a result

> you may not find a Defendant guilty merely because he conspired to distribute only some other illicit substance, that is, marijuana."
> (Tr. P. 2747 and 2748)

This charge, of course, is received after the jury is inundated with testimony regarding marijuana.

In the almost 3000 pages of testimony relating to incidents which the Appellant contends establishes multiple conspiracies, there is only the testimony of ROSSI relating to a single cocaine transaction by Appellant, THOMPSON. (Tr. P. 170-175, 177, 179 and 320-329) to connect the Appellant with any of the matters alleged in the Indictment.

Yet, the testimony largely revolves around what turned out to be a "rip off" of cocaine from co-defendant, Franklin Flynn, and the alleged distribution of this cocaine by various co-defendants.

The Appellant, as the testimony shows, was in no way involved in or connected with the Flynn robbery. In fact, one of the Government's chief witness to the Flynn robbery, Gary Pearson, testified that he did not even know the Appellant. (Tr. P. 1024)

Appellant contends that the evidence also showed other incidents which prove the existence of multiple conspiracies. These include the"Lucas-Mengrone robbery" (Tr. P. 340), the "Mathews robbery" (Tr. P. 347) and the"Samuels robbery" (Tr. P. 166).

In the course of testimony and evidence relating to the Lucas-Mengrone robbery, the Appellant was forced to sit before

the jury while they listened to tapes so full of violence, hatred, racial slurs and revenge that at least one of the jurors removed his headset and shook his head in disbelief. (Tr. P. 1382). Yet, the Appellant was connected in no way with this separate, distinct and uniquely outrageous incident.

The court in delineating for the jury the starting and ending points of the conspiracy stated:

> "The Government contends that the evidence has established a single on-going conspiracy among all the defendants to purchase, procure and in some cases to steal and resell narcotic drugs and that this conspiracy spanned the period of January 1, 1973 to June, 1974, but as I recall the testimony no acts in furtherance of the conspiracy as testified to here postdated January, 1974. (Tr. P. 2758)

At the conclusion of the case, the Court erroneously marshalled the evidence and gave the "all or nothing" charge, (Tr. P. 2798) so prejudicial to the Appellant, THOMPSON, whose participation in the above-mentioned single cocaine transaction, if such existed at all, constituted a separate conspiracy in itself.

STATEMENT OF THE FACTS

Trial (January 6-January 30, 1975)

The Government's Case

ALBERT ROSSI, JR. testified that in 1966 he was arrested on an assault charge and in 1967 arrested and convicted for assault. (Tr. P. 145)

In 1968 Rossi was arrested and convicted for uttering a false instrument and in 1969 was involved in an armed robbery in which a woman was shot. (Tr. P. 154)

Rossi was involved in a second armed robbery in 1969-1970 (Tr. P. 154) and a third of a Sealtest Milk Company in 1973. (Tr. P. 155)

Rossi was charged with attempted murder and assault in the first degree in 1971 or 1972. (Tr. P. 370)

In 1973 Rossi was also involved in attempted murder. (Tr. P. 156)

At the time of trial, Rossi had a pending Indictment in the Special Narcotics Part of the New York City Courts for criminal sale of dangerous drugs in the first degree. Also pending at the time of this trial was an Indictment for a sale of narcotics to an undercover agent in the Bronx, New York, (Tr. P. 396) performed in June, 1973 (Tr. P. 398). Rossi testified that he was aware that "my cooperation in Federal Court would be brought to the attention of the sentencing judge in State and Federal Court". (Tr. P. 390)

Rossi testified that he began dealing in narcotics in 1969 by purchasing and selling heroin (Tr. P. 157), eventually working his way up to kilogram sales of heroin with a Mr. Rizzierri in the end of 1972. (Tr. P. 158)

In the period of September to December, 1972, Rossi was introduced to Ernest Coralluzzo (Tr. P. 163) after which time the two parties became associated on a regular basis (Tr. P. 164). In January or February, 1973, Coralluzzo introduced Rossi to the Defendant, Louis Guerra, who agreed to supply cocaine to Rossi and Coralluzzo for resale (Tr. P. 165). Thereupon began a number of incidents which the Appellant, THOMPSON, submits, even if Rossi is to be believed, constitute separate conspiracies.

The Greg Samuels Robbery

Rossi testified that in March, 1973 he went to Florida and met with co-indictee, Greg Samuels (Tr. P. 166). That as a result of this meeting, Rossi sent the Defendant, James "Lump-Lump" Lombardo to New York to obtain two kilograms of cocaine from the Defendant, Guerra, to be sold to Samuels in Florida.

Rossi goes on to relate that he did not sell the cocaine in Florida, but rather returned it to Guerra in New York some time later. (Tr. P. 169)

It is not until cross-examination that Rossi admits that he in fact robbed Samuels of $36,000 (Tr. P. 478) although he does not remember whether the Samuels robbery occurred before or after the Sealtest Milk Company robbery. (Tr. P. 479) Furthermore, Rossi gave a statement to Special Agent Lough in April, 1974 that he himself brought the cocaine to Florida (Tr. P. 708) in direct contradiction to his testimony, supra., regarding Mr. Lombardo's role

as a courier.

Rossi's transaction with Thompson

A. BACKGROUND

Nothing further is heard about either Samuels or Lombardo during the course of the Trial.

Rossi was then asked:

> "As a result of that trip down to Florida did anyone from Florida come up to New York to visit you?" (Tr. P. 170)

There was absolutely no testimony or other evidence which connected in any way the Samuels incident with the trip to New York by the Appellant, THOMPSON, and the Defendant, Capotorto in May or June, 1973. (Tr. P. 171)

In fact, Rossi states that before this trip to New York he had never met the Appellant, THOMPSON, (Tr. P. 172) although he had met Capotorto. (ibid)

Unfortunately for the Appellant, he and the Defendant, Capotorto were represented by the same counsel, Alan Weinstein, although such dual representation clearly constituted a conflict of interest.

The Appellant had signed a waiver (Exhibit 1) in this regard, however, this waiver must be disregarded for two reasons.

One, the Appellant could not possibly have had a clear understanding of the implications and ramifications of his waiver.

Two, as the Trial unfolded it became apparent that the testimony of Rossi implicated Capotorto in the Flynn robbery as the individual who was present when Rossi was introduced to Angelo Iacono (Tr. P. 184), Franklin Flynn's partner (Tr. P. 187),

as well as during Rossi's meeting with Flynn himself. (Tr. P. 187)

Rossi also testified that Capotorto was involved in the Lucas-Mengrone robbery (Tr. P. 342) and the Frank Mathews robbery (Tr. P. 349)

However, there is no evidence demonstrating that the Appellant, THOMPSON, was involved in any manner with either the Flynn, Lucas-Mengrone or Mathews robberies.

All that exists in this regard was an unspoken inference that Thompson and Capotorto were partners in all of the above-mentioned matters. That inference, unfortunately was left unchallenged by Mr. Weinstein whose dual representation of Thompson and Capotorto in effect prohibited him from asking questions which would emphasise Capotorto's role at the same time that it limited that of Thompson.

B. THE ALLEGED TRANSACTION.

Rossi testified that Capotorto told him that he had come up to New York to buy a kilogram of cocaine to take back with him to Florida (Tr. P. 171). According to Rossi, Capotorto also informed him that four individuals, Thompson, Camperlingo, Bertolotti and himself had "all chipped in money" with which to purchase the cocaine. (Tr. P. 172)

Rossi thereupon obtained two kilograms of cocaine from Guerra, one of which was supposedly pure and the other diluted, sold one kilogram to Capotorto and Thompson and gave them the other"on consignment" whereupon "they got in their car and they drove to Florida." (Tr. P. 174-175)

In June, 1973, Rossi went to Fort Lauderdale, Florida where he and Coralluzzo were supposed to have met with Capotorto and Thompson. (Tr. P. 178) At this meeting, according to Rossi, the Appellant, Thompson, told him that the one kilogram of cocaine taken on consignment was unsuitable for "shooting" to which Rossi expressed his lack of concern and demanded payment. (Tr. P. 178)

Rossi states that the Appellant gave him $5,000. (Tr. P. 178-179)

Later in the Trial, Rossi relates a meeting taking place at Defendant, Joseph Camperlingo's home at which Rossi, Ernest Coralluzzo, and the Appellant, Thompson, Bertolotti and Capotorto were allegedly present some time during June or July. (Tr. P. 321)

> ROSSI: "He (Joe Camperlingo) said that Ray Thompson was going, I believe, to the Bahamas and pay people there for a load of marijuana that was going in, and at that meeting Angelo Bertolotti and Joseph Camperlingo and Ray Thompson said that the cocaine that they received in May or June from New York was sniffing cocaine and that they were having a problem with it, and at that meeting we made an agreement that if they would get x amount in other words, a certain amount 500, 600 pounds of marijuana and give it to us, we would take the money that they owed us for the cocaine off the bill." (Tr. P. 325)
>
> Mr. Lavin: "Was anything further said at that meeting?"
>
> ROSSI: "Ray Thompson left and myself, Coralluzzo, Joseph Camperlingo,Jimmy Capotorto and Bertolotti discussed when the pot was coming in and what they should do with the remainder of the coke." (Tr. P. 325)

Rossi testifies about an August meeting at Joseph Camperlingo's home. At this time, Rossi, Louis Lepore, Jimmy Capotorto,

and Nicholas DiGeorgio allegedly tried to rent a camper. The purpose of renting the camper was to transport to New York the marijuana which comprised part payment for the consigned cocaine allegedly purchased by the Appellant, Capotorto, Bertolotti and Camperlingo. (Tr. P. 327-329)

Thereafter, DiGeorgio, Rossi, Capotorto and Louis Lepore allegedly proceeded toward New York with the marijuana. (Tr. P. 329)

This testimony by Rossi in regard to the 600 pounds of marijuana as partial payment for the cocaine is frought with inconsistencies and contradictions.

Rossi states on direct examination that the 600 pounds of marijuana was being given to him and Coralluzzo as payment for the consigned cocaine. (Tr. P. 325)

> ROSSI: ". . .and at that (June or July) meeting we made an agreement that if they would get x amount in other words, a certain amount 500, 600 pounds of marijuana and give it to us, we would take the money that they owed us for the cocaine off the bill." (ibid)

Later, still on direct examination, Rossi describes a meeting which took place after the transportation of this marijuana by camper. The meeting took place at Charles Guida's apartment and present were Camperlingo, Rossi, Capotorto and Charles Guida. (Tr. P. 337, 338)

> Mr. Lavin: "Was there a conversation at that meeting?"
>
> ROSSI: "Yes there was."
>
> Mr. Lavin: "Could you tell us who said what at that meeting?"
>
> ROSSI: "Mr. Camperlingo said that money was owed on the marijuana and that we

> didn't do the right thing, we beat him, and that he laid out a lot of money. And I told him that the only possible thing I could do for you is that I know somebody is holding 125 pounds of marijuana and if they would want to give it up, I can give it to you." (Tr. P. 338)

Later, at a meeting which took place during the Feast of San Gennaro between Rossi, Camperlingo, Coralluzzo, Louis Guerra, and Vito DiSalvo, Rossi states:

> "At the meeting, Joseph Camperlingo asked Ernie Coralluzzo what happens to the marijuana and it went back and forth, and he said they were having problems it wasn't good, and he said he would give two or three thousand dollars in payment on the marijuana he received." (Tr. P. 339)

In one instance, Rossi states that the 600 pounds of marijuana was in payment for the cocaine which the Appellant, THOMPSON, Capotorto, Camperlingo and Bertolotti had allegedly purchased from him. In the next instance, Rossi alleges that Camperlingo claimed that money was owed on this marijuana and that Coralluzzo agreed to give Camperlingo two or three thousand dollars in payment thereof.

This striking inconsistency is but one of many which appears on the face of the instant record. Yet it goes to the heart of the only transaction in which the Appellant, THOMPSON, is allegedly involved.

Excluding this single alleged transaction in which the Appellant and three others purchased cocaine from Rossi and payed for same with money and a dubious marijuana payment, there is no evidence connecting Appellant to the separate and bizarre transactions described hereafter.

The Flynn Robbery

Rossi testified that in July or August, 1973, he met with Angelo Iacono who informed him "that he was partners with an individual by the name of Franklin Flynn who had connections in South America to get vast quantities of cocaine." (Tr. P. 187)*

Rossi told Flynn "that all the cocaine he could get I would buy it." (Tr. P. 188)

In August or September, 1973, Iacono came up to New York and Rossi, Capotorto and Guida met him at Kennedy Airport (Tr. P. 190-191)**

Iacono brought an ounce or more of cocaine with him which Rossi found to be good (Tr. P. 191-191a). In September, 1973, Flynn called Rossi and told him to come to Florida "and pick up the goods." (Tr. P. 192-193)

On September 22, 1973 (Tr.P. 201), Rossi, Coraluzzo, Louis Lepore, Browning, Angley, DeLuca, and Gary Pearson***all flew down to Fort Lauderdale, Florida, for the purpose of robbing cocaine from Franklin Flynn. (Tr. P. 196).

There then followed a vivid description of the armed robbery. (Tr. P. 207-210).**** A suitcase***** filled with cocaine was obtained. (Tr. P. 210)

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*Both Iacono and Flynn were indicted but never apprehended.

**Rossi testified that Flynn called from Florida to advise him that Iacono was coming to New York "with goods" (Tr. P. 190)

***An unindicted co-conspirator who testified for the government.

****A defense motion to strike all of this testimony was denied. (Tr. P. 208)

*****The one suitcase subsequently became "suitcases" filled with cocaine (Tr. P. 213)

Rossi then went on to testify how he and his associates brought the cocaine back to New York (Tr. P. 212-214). There was a vivid description of Rossi having the cocaine tested by Rubin who exclaimed "that it was the best cocaine he had ever tested" (Tr. P. 218). Rossi, Coralluzzo, Spangler and Greco then packaged the cocaine placing it in 26 or 28 fifteen-ounce packages. (Tr. P. 218-220)

(a) Distribution of the "Flynn" cocaine

Rossi then proceeded, for more than 100 pages of the record on his direct examination, to describe his efforts, along with Coralluzzo, to distribute the cocaine stolen from Flynn.

At the end of September, or the beginning of October, 1973, Rossi and Coralluzzo received $20,000 from Rubin for a kilogram of cocaine (Tr. P. 226-230). The jury was then told at great length about negotiations and the ultimate distribution of a substantial quantity of the "Flynn" cocaine to the Defendant, Cimmino, unindicted co-conspirators George Toutoian and Louis Lepore and the Defendant, DeLuca (Tr. P. 232-241). Rossi testified that during this same period, he and Coralluzzo sold the defendant, Guerra two 15-ounce packages of the "Flynn" cocaine. (Tr. P. 243-4). There was a transaction involving the distribution of that cocaine to the defendants Guida and Bivens. (Tr. P. 248-249)

Rossi testified about the sale of half a kilogram of the "Flynn" cocaine to the Defendant, Cosme with Pearson as the intermediary. (Tr. P. 250-252)

Rossi then regaled the jury about his secreting the remainder of the "Flynn" cocaine after he learned in late October,

1973 that there was a warrant outstanding for his arrest. (Tr. P. 254-264). While a fugitive, Rossi continued the distribution of the "Flynn" cocaine through the appellant, Angley, the Defendants, Marrero and Sherman and an unindicted co-conspirator called "Sally Goose". (Tr. P. 264-268)

There was testimony about the sale of a quarter of a kilogram of the "Flynn" cocaine by the Defendant, Marrero and a co-conspirator called Carey, both acting on Rossi's behalf. (Tr. P. 268-270).

Marrero also testified for the prosecution regarding that transaction. (Tr. P. 1405-1431; 1444-1459)

Rossi testified about additional sales of the "Flynn" cocaine to the Defendant, Joseph Lepore, and the unindicted co-conspirator Louis Lepore (Tr. P. 271-273); to the sale of a kilogram of the cocaine through Marrero and Carey in Boston (Tr. P. 274-276) and another quarter kilogram sale of that cocaine to Carey through the Appellant, DeLuca (Tr. P. 280284).

Rossi testified that in November, 1973, he met with the Defendant Arnold to discuss the latter's buying cocaine and two subsequent "buys" through the Defendant, Guida. (Tr. P. 288-293)

There then followed extensive testimony about Rossi and Coralluzzo, first negotiating with, and then, in December, 1973, selling a large quantity of the "Flynn" cocaine to the Defendants Crea and Artuso for a total of $15,000 (Tr. P. 293-306).

From that transaction, Rossi went on to testify about a kilogram deal in December, 1973, in which the Appellant, Angley

was to be the intermediary (Tr. P. 308). Relating what the Defendant Guida had supposedly told him, Rossi testified that Guida and Angley were in separate cars at a parking lot in the Bronx preparing to give the buyer of the cocaine a sample when law enforcement officials "started to close in on them" (Tr. P. 308-313).

Later on in the trial, the prosecution called John Serrano as a witness who testified that he was the prospective buyer of that particular cocaine from Angley which was aborted by the presence of federal agents. (Tr. P. 1122-1125)

Prior to that occasion, Serrano had received a sample of the cocaine contained in a cigarette box from Angley, which was introduced at the trial. (Tr. P. 1117; Govt. Exh. 1)* This was the only physical evidence of any drugs introduced at the trial.

Rossi testified that in December, 1973, after the abortive attempt to sell the cocaine to Serrano, Guida told him that he had another customer, the Defendant Arnold (Tr. P. 313-314). Rossi further testified that he received about $12,000 or $13,000 from Guida from the resulting sale to Arnold. (Tr. P. 316)

The evidence relating to the robbery of the cocaine from Flynn and the subsequent distribution of that cocaine was

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*Serrano was accompanied on that occasion by a government informant identified only as "Roberto" (Tr. P. 1637). Serrano gave the cigarette box containing the cocaine to "Roberto" who turned it over to Agent Bell. (Tr. P. 1639)

totally unrelated to the Appellant, THOMPSON. He neither participated in the robbery nor had anything to do with the distribution of the cocaine, either as buyer, seller, or intermediary. There was absolutely no evidence presented that would even suggest that the Appellant had any knowledge, concern, or stake in those events. There was not one word of testimony linking him in any manner to those events and transactions.

Clearly, the Flynn robbery and what transpired thereafter was the core of the conspiracy. All thirteen overt acts alleged in the conspiracy count relate to either the planning and preparation of the robbery or to the subsequent distribution of the cocaine that was stolen.*

THOMPSON is alleged in overt act number 2 to have met with Flynn, Silverio, Iacono and Rossi in Hollywood, Florida, in July, 1973, to discuss the purchase of cocaine. There was absolutely no testimony at the trial to substantiate that.

Thus, THOMPSON's participation in the very conspiracy alleged in the Indictment was not established at the trial (see Point 2, infra).

Moreover, a mass of testimony was allowed to be introduced which, while extremely prejudicial, had absolutely no relation to the conspiracy charged in the Indictment, nor any connection to

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* All of the eight substantive counts related to the distribution of the cocaine stolen from Flynn. As already noted, Thompson was not charged in any of those counts.

the Appellant, THOMPSON.

The Lucas-Mengrone Affair

Rossi testified that in August or September, 1973, in Mount Vernon, New York, he met with unindicted co-conspirator Peter Mengrone, Frank Lucas and an individual named Morris, at which meeting Lucas told Rossi that he was interested in obtaining 10 kilograms of heroin (Tr. P. 340). About a week later, as related by Rossi, Lucas gave Mengrone about $30,000 as part payment for the heroin, which Mengrone turned over to Rossi. (Tr. P. 341-342)

Rossi had no intention of delivering the heroin to Lucas and, in effect, stole the money from him. (Tr. P. 343-345).

Rossi, through his partner Coralluzzo and their friends, thereupon, engaged in a charade with Mengrone, the middleman in this transaction about "delivery" of the non-existent heroin to Lucas. The jury was treated to an exhibition of wire-tapped telephone conversations among a host of individuals in which phony threats and counterthreats of kidnappings and bodily harm were made.

None of this testimony, not one word, related in any manner or fashion to the Appellant, THOMPSON.

During the course of the trial, approximately 56 wire-tapped conversations were played to the jury over the course of two days.

Prior to the introduction of the wiretapped conversations into evidence, Mr. Gerald Lefcourt, Attorney for the Defendant-Appellant, Guerra, moved to have them excluded inter alia on the grounds that the wiretapped conversations were being offered for

the truth of the statements made therein, but were in reality part of a "rip off" in which the Defendant, Guerra and others pretended to be drug dealers to induce Peter Mengrone and Frank Lucas to give money for which they would receive nothing. (Tr. P. 1208)

The motion was denied. (Tr. P. 1229, 1230)

Thereupon, the jury listened to numerous discussions of alleged narcotics deals, guns, kidnappings, racial slurs and threats of violence. None of this material involved the Appellant, THOMPSON, in any way. Yet, it was the Appellant, as well as the parties whose voices were heard on the tapes who sat before the jury during the two days which the tapes were played.

Mr. Lefcourt also demonstrated that the wiretapped conversations themselves were part of a fraud on Lucas and Mengrone to induce them to give money for which they would receive nothing. That the wiretapped conversations were not in furtherance of any narcotic conspiracy or transaction and further that the prosecution knew or should have known these facts. (Tr. P. 2842 2843)

The Mathews-Harrison Affair

Rossi testified that in either March or April, 1973, he met unindicted co-conspirator Frank Mathews in a New York City Bar where they discussed "buying heroin on a large quantity, like 30 or 50 kilos" (Tr. P. 347-348). As a result of this meeting, Matthews gave Rossi $250,000 for heroin purchases and another prospective purchaser of heroin, the unindicted co-conspirator, Harold Harrison, gave him $120,000 (Tr. P. 348).

Rossi then related how he and Coralluzzo proceeded to the latter's home with a suitcase containing $250,000 of Mathews' money, where the following colloquy between them ensued:

> "I (Rossi) told Ernie Coralluzzo, 'What are we going to do?'
>
> He (Coralluzzo) said, 'We are going to beat them.'
>
> I said, 'How are we going to beat them? They know where my father and mother live(s)'." (Tr. P. 349)

Upon learning that Matthews and Harrison were holding the appellant Capotorto* as hostage for the return of their money, Rossi and Coralluzzo fled to the Bahamas. (Tr. P. 349-350).

As with the Flynn robbery and the Lucas-Mengrone "rip off", the theft of $370,000 from Matthews and Harrison under the guise of selling them heroin had absolutely nothing to do with the Appellant, THOMPSON.

The Festa Tape

The only Government witness besides Rossi to give testimony against the Appellant was George Festa, a special agent with the Drug Enforcement Administration.

Festa testified that on May 3, 1974, he spoke to an individual who identified himself as Joey (Tr. P. 1532) and informed Joey that he was a friend of Rossi's from New York and he would be down in Florida later that evening. (Tr. P. 1535)

At the time of this May 3, 1974 conversation, Festa was

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* Rossi testified that he was first introduced to Matthews in March or April, 1973, by Capotorto. (Tr. P. 351)

in his New York Office. Present with him in this office was Albert Rossi.

As a result of a telephone discussion between Festa and "Joe" on May 4, 1974, Festa met with Camperlingo and the Appellant at the Four O'Clock Club. (Tr. P. 1536-1537)*

During the course of this meeting, Festa testified that Camperlingo indicated that he would be able to pick up marijuana for Festa in South America and bring it into Miami for him. (Tr. P. 1538)

At this point the Court stated:

> "The purpose for which the conversation has been admitted has been served, hasn't it? You don't need the details of the whole conversation, do you?" (Tr. P. 1540)

but allowed Festa to continue his testimony.

Festa then went on to describe in detail his conversation with Camperlingo in regard to the expenses and problems of the smuggling business.

Subsequently, Festa related his conversations with the Appellant in regard to the procedure used in the smuggling business. Camperlingo, who had left prior to Festa's conversation with Appellant, then joined both Festa and Appellant in this conversation. (Tr. P. 1542)

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* On cross-examination, Festa testified that his purpose in meeting with Camperlingo was:

> "To determine if he (Camperlingo) had a connection in the Federal Government whereby he was obtaining information and smuggling narcotics into the country." (Tr. P. 1554)

Festa then testified that he left for New York (Tr. P. 1543) and while in New York spoke to Appellant (Tr. P. 1543) who referred Festa to Camperlingo. Festa spoke to Camperlingo but nothing further came of the conversations described herein (Tr. P. 1543-1545) and no agreements were reached.

The Government then established through Festa's testimony that the conversations of May 4, 1974 between Festa and Camperlingo and THOMPSON had been recorded (Tr. P. 1545)

The tape of this conversation was then admitted into evidence over objection of counsel (Tr. P. 1548). The following exchange then ensued:

> Mr. A. Weinstein: "Your Honor, I object as being repetitive. I believe as long as he testified to the substance of the conversation. . ."
>
> THE COURT: "I have that sort of feeling myself. I thought you were going to use one or the other, Mr. Lavin. He has testified to the conversation. I don't know why we need to hear it. I thought it was going to be one or the other."
>
> Mr. Lavin: "I'm sorry. My intention was to play the tape."
>
> THE COURT: "He has given us a blow-by-blow description apparently, of what would seem to be verbatim of what is on the tape. All right, go ahead."
>
> Mr. A. Weinstein: "Is your Honor allowing the tape to be played?"
>
> THE COURT: "It is duplication, but I am going to allow it, yes. It is duplication. We have had the testimony." (Tr. P. 1549-1550)

and

Mr. A. Weinstein: "Your Honor. May we have stricken from this those portions not in furtherance of any conspiracy by any alleged co-conspirator? There are clearly portions of this that are reflected in this Transcript that are not and cannot be in furtherance of any conspiracy."

THE COURT: "I understand that and I agree with that. These conversations are not being admitted in furtherance of the conspiracy, in any event, and I gave instructions to the jury as to what the purpose of it was. (Tr. P. 1552)*

These portions that do not deal with it I gave instructions with respect to it."

The tapes were then played.

CONCLUSION

At the close of the Government's case, the Court rejected all defense motions for severence and judgment of acquittal (Tr. P. 2187) and summarized the evidence against the Appellant as follows:

"Capotorto and Thompson, I will talk about those two together. Capotorto came to New York and spoke with Rossi with Mr. Thompson and to buy some cocaine and indicated that the money for the cocaine was pooled money of this, THOMPSON, Bertolotti and Camperlingo and Mr. Thompson sniffed the cocaine and announced its good. Mr. Capotorto followed the transportation of the marijuana to New Jersey." (Tr. P. 1822)

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* "These conversations are to be considered by you solely in respect of the two Defendants with whom the conversations were had and they are to be considered by you in that context solely in respect of your determination of two things, as to whether as between Rossi and the two Defendants named a conspiracy existed as alleged in the Indictment, No. 1, and No. 2, as to whether the two Defendants were members of the conspiracy. These conversations are not to be considered by you in any respect in regard to any other Defendant." (Tr. P. 1534)

The Appellant, RAYMOND THOMPSON, was found guilty of conspiracy (Tr. P. 2838) and received a five year sentence, $5,000 fine and three years special parole.

POINT I

MULTIPLE CONSPIRACIES WERE ESTABLISHED AS A MATTER OF LAW

"In United States v. Borelli, 336 F. 2d 376, 383 (2 Cir. 1964) cert. denied sub nom. Cinquegrano v. United States, 379 U.S. 960 (1965), a case where the Government claimed that a single narcotics conspiracy; with many changes of personnel, had lasted for nine years, while in no way questioning what had been held in Agueci and many other cases, we called attention to one flaw in the "chain" metaphor. As we there said:

> 'This simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs; in other words the extreme links of a chain conspiracy may have elements of the spoke conspiracy'

"We suggested in a footnote, id. at 383 m2, that in such event there would be more than one conspiracy unless the evidence of the scale of the operation permitted the inference that the persons at a particular level must have known that others were performing similar roles. We have applied that principle to uphold single conspiracy convictions in many cases (citations deleted)

"While questioning the validity of at least some of our decisions, appellants predicate their main attack on the ground that the value and quantity of drugs here proved to have been sold were of nothing like the scale established in previous cases where we upheld single conspiracy convictions of persons on the same

functional level of the organization despite the absence of specific evidence of agreement among them. We are inclined to agree."

United States v. Miley, Argued January 17, 1975, Decided March 19, 1975. Docket Nos. 74-2207-10, 74-2423 (2d Cir. 1975). (emphasis added)

Rossi and Coralluzzo in the instant case may have formed the conspiracy set forth in Count I of the Indictment, but it is clear that Appellant was not a party thereto.

If Rossi is to be believed, the testimony establishes a wide and diverse range of criminal activity rather than an organized, on going, vertically-integrated operation.

The Government in the instant case portrays these diverse activities as the many heads of the hydra, with each head being attached to a main body of unified purpose, intent and knowledge.

However, it was only Rossi and Coralluzzo who shared a unified purpose and intent. For it was only Rossi and Coralluzzo who masterminded what in reality were a series of otherwise unconnected robberies and "rip offs"

If a single conspiracy existed, then it existed between Rossi, Coralluzzo and the other Defendants involved in the Flynn robbery and subsequent distribution of the "Flynn" cocaine which formed the nexus of the conspiracy. If the Appellant is guilty of a conspiracy at all, it was a separate conspiracy to purchase a small amount of narcotics in a single transaction unrelated to the conspiracy charged in the Indictment.

Certainly it cannot be inferred from Appellant's isolated purchase that he shared the same knowledge, intent and

goals of the alleged single conspiracy, possessed by Rossi and Coralluzzo and those Defendants involved in the Flynn incident.

The evidence presented at trial was insufficient to demonstrate that Appellant, THOMPSON's awareness of Rossi and Coralluzzo's activities went beyond his two kilogram cocaine purchase.

For it was Rossi and Coralluzzo who engineered and carried out the Flynn robbery.* Appellant had no involvement in this incident whatsoever.

It was Rossi and Coralluzzo who executed the Lucas-Mengrone robbery. This incident resulted in tapes which spoke of murder, kidnapping and violence in terms so vituperative and bizarre that at least one member of the jury found it necessary to remove his earphones.

The Appellant was not involved in any way with the Lucas-Mengrone robbery, with the Matthews "rip off" or the Samuels "rip off" or the distribution of cocaine following the robbery of Franklin Flynn.

At most, if the uncorroborated testimony of Rossi is to be believed, the Appellant conspired with Rossi and Coralluzzo to purchase two kilograms of cocaine** but not to engage in the larger-scale drug transactions.

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*Rossi and Coralluzzo were allegedly aided in this incident by Angley, Browning, Silverio, DeLuca, Lepore and Pearson. Pearson was one of the government's chief witnesses.

** For which Camperlingo, Capotorto and Bertolotti allegedly "chipped in".

In United States v. Sperling, 506 F. 2d 1323 (2d Cir. 1974), the Court found a single conspiracy to distribute "(an) enormous amount of heroin and cocaine for profit", in that there was an "integrated and continuing conspiracy between the Pacelli and Sperling groups." Each acted as customer and supplier of the other.

However, the Court went on to state:

> "In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court, refer to United States vs. Rizzo, 491 F. 2d, 1235 (2 Cir. 1974); United States vs. DeMarco, 488 F. 2d 828 (2 Cir. 1973); United States vs. Mapp, 476 F. 2d, 67 (2 Cir. 1973); we take this occasion to caution the Government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the Indictment format reflected in this case. While it is obviously impractical and inefficient for the Government to try conspiracy cases one at a time, it has become all to common for the government to bring indictments against a dozen or more Defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top."

The instant Indictment itself delineates one of these conspiracies, i.e. the Flynn robbery. For each and every overt act following the conspiracy allegation deals exclusively with the robbery of Flynn and the subsequent distribution of the cocaine obtained thereby. The Indictment, thus, does charge one extensive and complete conspiracy, the conspiracy to rob Flynn and distribute

the proceeds of this robbery, to wit: cocaine.

However, there is absolutely no evidence connecting the Appellant with this conspiracy, i.e. the cocaine obtained from the Flynn robbery. If Appellant was in fact involved in a conspiracy, it was a minor one indeed, involving no enormous amounts of cocaine, or continuous and integrated action,but merely the purchase of 2 kilograms of cocaine on one instance.

Furthermore, this cocaine was not obtained from Franklin Flynn, as Rossi provided this cocaine to Appellant prior to the Flynn "rip off".

The Court, in United States vs. Bynum, 485 F. 2d, 490 (2nd Cir. 1973) established the pattern of the single large scale drug sale conspiracy and states:

> "The pattern is now familiar. Raw drugs in large quantities have to be imported and supplied. In this case the core operators, Bynum and Cordovano, respectively, supplied the capital and the contact with the suppliers who provided the raw material. The raw drugs then had to be adulterated or cut, packaged and then resold to purchasers who eventually made them available to the victims. In more normal business ventures this would be described as a vertically integrated loose-knit combination. The point, of course, is that each level of the operation depends upon the existence of the other and the mutual interdependence of each is fully understood and appreciated by the other. This knowledge on the part of Bynum and Cordovano operating in the middle layer is obvious. The supplier, Defendants, Birnbaum, Altamura, Feroldi, Tuzzolino, Coniglio and Mele could not reasonably suppose that the large amounts of raw cocaine and heroin received by Bynum and Cordovano and that suppliers of the raw drugs had to be involved. This is the usual chain conspiracy encountered

in drug cases."

However, in the instant case, there is no evidence of the existence of importers of cocaine and heroin. The only supplier of cocaine of more than a minimal quantity is not an overseas exporter with whom Rossi and Coralluzzo had an ongoing relationship, but rather the unwitting victim of a robbery: Franklin Flynn. This matter raises another critical issue.

The only evidence of any vertically integrated operation whatsoever is gleaned from the Flynn robbery, a total and complete conspiracy within itself.

For, it is only in the Flynn robbery that there is evidence of a supplier, a middleman, a cutter or a packager, a chemical tester and consecutive sales and further sales.

The Indictment itself bears witnesses to this.

Each and every overt act refers to those events dealing with the Flynn robbery and the vertical integration involved in the ultimate distribution of the Flynn cocaine.

There is absolutely no competent evidence whatsoever connecting the Appellant with the Flynn conspiracy in any way.

If Appellant's alleged purchase of 2 kilograms of cocaine from Rossi and Coralluzzo established a conspiracy at all, it established a separate conspiracy to the Appellant.

The prejudice resulting to Appellant as a result of being charged with participating in a single conspiracy when, in fact, multiple conspiracies existed, was both real and substantial.

The Supreme Court in Kotteakos vs. United States, 66 S. Ct. 1239, 328 U.S. 750 (1946) set a standard by which to determine

whether an error in alleging a single conspiracy where a multiple conspiracy exists is prejudicial or harmless where it stated at 66 S. Ct. 1248:

> "If when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.
>
> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

In the instant case, the sheer number of Defendants, although reduced somewhat at the time of the Trial, created a situation in which spillover prejudice was unavoidable.

It is interesting to note that the Government in Kotteakos attempted to nullify the effect that the large number of Defendants had by arguing at Page 1249:

> ". . .that there was no prejudice here because the results show that the jury exercised discrimination as among the Defendants whose cases were submitted to it."

The Government demonstrated that the jury acquitted some, disagreed as to others, and found others guilty. From this it concludes that:

> "The jury was not confused and apparently reached the same result as would have been reached or would be likely, if the convicted Defendants had been or now should be tried separately."

The Supreme Cout in Kotteakos, supra, rejected this argument.

Even more prejudicial to Appellant than the number of Defendants he was forced to sit with, was the outrageous and vituperative evidence which the jury listened to in the form of tape recorded conversations.

These conversations made no mention of Appellant and in fact were related to the Lucas-Mengrone "rip off", a separate conspiracy in itself not involving the Appellant in any way.

Nevertheless, Appellant was forced to sit before the jury as a Defendant while the jury was regaled with testimony dealing with murder, kidnapping, violence, racial and ethnic slurs so grotesque and repulsive that at least one juror removed his headphones and shook his head.

From all of this testimony, it is clear that there was error committed by the Prosecution in the instant case by referring to a single conspiracy, when in fact, multiple conspiracies existed which was harmful and prejudicial to the Appellant, RAYMOND THOMPSON, and which was not corrected or ameliorated in any way during the course of the Trial.

POINT II

THE EVIDENCE OF APPELLANT'S ISOLATED PURCHASE OF COCAINE WAS INSUFFICIENT TO PROVE THAT HE WAS A PARTICIPANT IN AND HAD KNOWLEDGE OF THE BROADER CONSPIRACY CHARGED IN THE INDICTMENT

"As to (The Appellants, DelBusto and Garcia) the Government relies upon the single act doctrine in urging that there was sufficient evidence to support their conspiracy convictions. We disagree, 'for a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws there must be independent evidence tending to prove that the Defendant in question had some knowledge of the broader conspiracy or the single act itself must be one from which such knowledge may be inferred.'" United States v. Denoia, 451 F. 2d 979, 981 (2 Cir. 1971), citing United States v. Agueci, supra. 310 F. 2d at 836, and United States v. Aviles, 274 F. 2d 179, 189 (2 Cir.) cert. denied, 362 U.S. 974 (1960)'" United States v. Sperling, 506, F. 2d 1323 (1974).

As Judge Learned Hand stated in United States v. Falcone, 109 F. 2d 579, 581 (2 Cir.) aff'd 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940), in order for a man to be held for joining others in a conspiracy he "must in some sense promote their venture himself, make it his own."

The Court in United States v. Borelli, 336 F. 2d, 376 385 (1964) stated in quoting the above passage:

"It becomes essential to determine just what he is promoting and making his own."

Even after viewing the evidence against the Appellant, RAYMOND THOMPSON, in the light most favorable to the Government, it is clear that, at most, the Appellant made a single isolated purchase from Rossi and Coralluzzo.

There is absolutely no evidence establishing that the Appellant was engaged in an ongoing business relationship with Rossi or Coralluzzo, nor may any reasonable inferences thereof be drawn from any of the evidence. It is necessary, therefore, that Appellant's conviction be reversed.

The proof against Appellant consisted solely of the testimony of Albert Rossi, Jr., who testified:

1. That the Appellant and Capotorto came up to New York from Florida and purchased 2 kilograms of cocaine for which THOMPSON, Capotorto, Bertolotti and Camperlingo had "chipped in" in the purchase price.

2. That Rossi and Coralluzzo had met with THOMPSON and Capotorto on one occasion in Florida to receive money as part payment for the second kilogram of cocaine which had been purchased on consignment.

3. That Rossi and Coralluzzo met with THOMPSON, Capotorto, Camperlingo and Bertolotti in Florida in June or July to discuss the remainder of payment for the cocaine.

4. That Rossi met with Capotorto, Camperlingo, Bertolotti, Appellant, Nicholas DiGeorgio and Louis Lepore at Camperlingo's home in Florida. Allegedly, as a result of this meeting, Rossi received

600 pounds of marijuana which comprised further payment for the consigned cocaine allegedly purchased by Capotorto, Bertolotti, Camperlingo and the Appellant.

The source of this testimony, Albert Rossi, Jr., is a study in violence and perniciousness. Rossi testifies to having committed numerous armed robberies in which at least one innocent bystander was shot. He admits to assault and attempted murder.

Rossi admits further to dealing in narcotics since 1969. However, the pattern of his narcotic deals show a criminal who is not so much a robber turned narcotics dealer as a robber whose booty turns out to be narcotics rather than simply money or jewels. The Samuels "rip off", the Lucas-Mengrone "rip off" and most importantly the Flynn robbery bear witness to this fact.

Rossi, who in other respects is anything but a master of the understatement admitted during cross examination that he was aware that his cooperation in Federal Court would be brought to the attention of the sentencing judge in State and Federal Court.

The Appellant urges this Court to consider the character of Rossi as well as his propensity and motive to lie in weighing the sufficiency of the evidence in the instant case.

In United States v. DeNoia, supra. this court found two Appellants to be within the ambit of the conspiracy charged in that:

> ". . .The evidence relating to the two sales and Jacovino's and Scorzello's proven knowledge of the common origin of the drugs in the two transactions, is sufficient for an inference that

> each knew he was involved in a criminal enterprise of substantial scope, which was likely to involve other persons. Therefore, even though each was only implicated in one transaction, a jury could properly infer participation in an over-all conspiracy. United States v. Bentvena, 319 F. 2d 916, 928 (2 Cir. 1963), cert. denied, 375 U.S. 940 (1964); United States v. Agueir, supra. 310 F. 2d at 836."

In the instant case, Appellant and three others purchased two kilograms of cocaine from Rossi in one instance. The only other testimony involving Appellant deals with the payment for this cocaine.

There is no testimony whatsoever demonstrating that Appellant had any knowledge of the origin of these drugs, nor was the quantity of narcotics involved, two kilograms, large enough to provide Appellant with knowledge that he was "involved in a criminal enterprise of substantial scope" United States v. Bentvena, supra.

The trial court in the instant case allowed in, over objection, the testimony of Special Agent George Festa allegedly for the purpose of showing Appellant's knowledge of the existence of the conspiracy and of Appellant's prior dealings with Rossi as well as his knowledge and intent.

Festa's only testimony regarding Appellant concerned itself with a May 4, 1975 meeting with Appellant and Camperlingo in Florida where Festa stated:

> "I then asked him when he (Camperlingo) was leaving for his trip. He indicated that he was leaving that Monday and that was the reason why he brought RAYMOND THOMPSON with him, that I should get together with RAYMOND THOMPSON, while Mr. Camperlingo was out of town and work a deal. He indicated to me at that time that getting the merchandise

up into the Miami area would be no problem since smuggling was their business."

Camperlingo then left.

"At this point we began talking to (Appellant) and he indicated to me the procedure used in smuggling into the United States."

On cross examination, Mr. Festa stated that the purpose for his trip to Florida was to determine whether Camperlingo had a connection in the Federal Government whereby he was obtaining information and smuggling narcotics into the country. (Tr. P. 1554) At Page 1602 and 1603 the following exchange took place between Mr. Alan Weinstein, Attorney for Defendants, THOMPSON, Capotorto, and Festa:

By Mr. A.Weinstein:

Q. Agent Festa, just so I understand this, you met Mr. Rossi up her in Mr. Lavin's office, right?

A. Yes, that's correct.

Q. And you went down to Miami to see if there was some supposed corruption in the Federal Government, right, a connection?

A. Yes, that's right.

Q. You didn't go down there concerning drugs at all, did you?

A. No, I didn't.

Q. Mr. Rossi, then didn't get involved with telling you anything about drugs, did he?

A. No, he did not.

Q. And he didn't tell you that he engaged with Mr. Thompson in any supposed drug deal, did he?

A. No, he did not.

Q. Did Mr. Thompson ever once tell you he knew Mr. Rossi?

A. No he did not.

Q. And Mr. Thompson never told you he engaged in and drug deals with Mr. Rossi, did he?

A. No, he did not.

It is clear from the above that Festa's testimony does not corroborate that of Rossi. In fact, Festa's testimony in no way shows that Thompson had knowledge of the alleged conspiracy or had prior dealings with Rossi.

The only evidence at all tending to link the Appellant with the alleged conspiracy is the unsupported testimony of Rossi, and at most, that testimony alleges that the Appellant was involved in a single transaction involving only two kilograms of cocaine.

This Court in United States v. Koch, 113 F. 2d 982 (2 Cir. 1940) held that a single act such as the single transaction in the instant case will not permit an inference of knowledge of the broader conspiracy.

The Court stated, at Page 983:

> "One of the many issues raised by the Appellant on this Appeal is whether or not the evidence was sufficient to prove that he knowingly joined the conspiracy to import and dispose of the

narcotics. It has been strenuously argued that the utmost reach of the proof made him out to be only an isolated purchaser from the conspirators and not proved guilty of the crime charged in the Indictment even though the purchase was unlawful. It is apparent that there is real difficulty in this respect. The amount of the cocaine purchased would, of course, indicate that it was taken not for personal consumption alone but for resale. But the Appellant was not a steady purchaser from the conspirators and so it cannot be inferred as it was in United States v. DeVasto, 2 Cir. 52 F. 2d 26, 78 A.L.R. 36, that he knew of the conspiracy and was acting to further its ends rather than exclusively his own. Nor does the situation shown in evidence here correspond essentially to that in United States v. Bruno, 2 Cir. 105 F. 2d 921, where the Appellants knew they were helping carry forward one or more phases of a conspiracy. Here, for aught that appears, the Appellant had no knowledge whatever as to how Mauro had obtained the cocaine. No doubt he knew that Mauro's possession of it was unlawful and that was true also of the sale to and purchase by him. But there was nothing in the evidence to warrant a finding that he knew that Mauro was not, or had not previously been acting alone in getting possession of the drug or how he may have obtained it.

The purchase of the cocaine from Mauro and the Appellant was not enough to prove a conspiracy in which Mauro and the Appellant participated. They had no agreement to advance any joint interest. The Appellant bought at a stated price and was under no obligation to Mauro except to pay him that price. The purchase alone was insufficient to prove the Appellant a conspirator with Mauro and those who were his co-conspirators. Dickerson v. United States, 8 Cir. 18 F. 2d, 887. It was necessary to the government's case to show that the Appellant was in some way knowingly associated in the unlawful common enterprise to import the drugs and dispose of them unlawfully. United States v. Peoni, 2 Cir. 100 F. 2d 401, Muyres v. United States, 9 Cir. 89 F. 2d 784."

In the instant case, Appellant is charged with conspiracy to distribute and possess with intent to distribute Schedule I and Schedule II narcotic drug controlled substances. Although the Appellant in the instant case was not charged with conspiracy to import narcotic drugs, the principles set forth in United States v. Koch, supra. are applicable here.

For, at most, Appellant was only an isolated purchaser of narcotics from Rossi and his co-conspirators. Even if Appellant committed an unlawful act by this purchase, he is not guilty of the crime charged in the Indictment.

There was absolutely no evidence showing that Appellant was a steady purchaser from Rossi and his co-conspirators. In fact, Appellant had no involvement at all in the Flynn robbery or the events subsequent thereto. All of the overt acts listed in the Indictment dealing with the distribution of cocaine, address themselves to the cocaine obtained as a result of the Flynn robbery. Appellant's alleged isolated purchase, if it occurred at all, occurred prior to the Flynn incident and bore no relationship to it whatsoever.

Furthermore, there is no evidence that Appellant was aware of the conspiracy charged and was acting to further its ends, rather than strictly his own. Appellant had no knowledge of where Rossi and Coralluzzo obtained their cocaine, for Rossi himself made sure that this "source" remained a secret. On Page 174 of the transcript the Government asks Rossi what happened when Guerra came to his (Rossi's) mother's house with the cocaine which allegedly was involved in Appellant's only

purchase from Rossi.

> Rossi: "I believe a day later Mr. Guerra came to my mother's house and when I seen his car pull up to the block, I told Mr. Thompson and Mr. Capotorto and Mr. Ripulone to go into Mr. Capotorto's car because I didn't want the individuals to meet each other and Mr. Guerra came in my mother's house with an attache case.
>
> Q. Who else was in your mother's house?
>
> A. Myself and Ernie Coralluzzo.

Thus, at most, Appellant engaged in a single, isolated transaction with Rossi and Coralluzzo in which Rossi took great pains to keep his supplier's identity secret from Appellant.

Appellant had no agreement with Rossi or Coralluzzo to advance any joint interest. Appellant had no duty to Rossi and Coralluzzo other than to pay the purchase price of the cocaine and no knowledge other than that Rossi and Coralluzzo had possession of the cocaine from an unknown source.

The only other meetings between Appellant, Rossi and Coralluzzo occurred when the latter two, on their own initiative visited Florida to secure payment for the one adulterated kilogram of cocaine.

Allegedly as a result of these meetings, Rossi and Coralluzzo received cash and marijuana as payment for this kilogram.

In short, any meetings taking place between Appellant and Rossi and Coralluzzo subsequent to the two kilograms of cocaine changing hands in New York were only for the purpose of Rossi and Coralluzzo obtaining payment for this cocaine and thus these meetings were merely part of the single transaction set forth above.

Appellant's isolated purchase, as related solely by the testimony of Albert Rossi, Jr. therefore, does not constitute sufficient evidence that Appellant knew of or participated in the broad conspiracy charged in the Indictment. Accordingly, his conviction must be reversed and the Indictment, as to him, must be dismissed.

POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT APPELLANT'S MOTION FOR A SEVERENCE

"Before Trial and on numerous occasions during the Trial counsel for Shuck moved for a severance of the case as against him. It is well settled that the Trial Judge is under 'a continuing duty at all stages of the trial to grant a severance if prejudice to a particular Defendant is made manifest.' Schaffer v. United States, (1960), 362 U.S. 511, 516.

" . . .The principal and inevitable prejudice, however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shuck's co-Defendants, Kelly and Hagan. The ingenious schemes and designs they formulated to cover their tracks as well as the shameless way in which they manipulated the market, thumbed their noses at the S.E.C. and feathered their nests at the public expense, concealing their illgained payoffs by means of organizations formed under the secrecy laws of Liechtenstein and Switzerland, must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on Shuck we cannot doubt. When this accumulation reached its peak in the offer into evidence of the administrative testimony of Kelly and Hagen and the letter by Kelly connected therewith, and this testimony and the letter were received in evidence, it is clear to us that the motion then made by counsel for Shuck for a severance should have been granted. It was an

buse of judicial discretion to deny the motion for a severance at that time." United States v. Kelly, 349 F. 2d, 720 (1965)

Although the Kelly case involved a stock fraud conspiracy case, while the instant case involves narcotics, the principles relating to severance as set forth in Kelly are directly on point to the instant case.

In the instant case, there was a "slow and inexorable" accumulation of evidence of narcotics "rip offs" and robberies by Appellants, Co-Defendants, Rossi and Coralluzzo, as well as a number of other Co-Defendants.

Evidence was allowed in as to the intricate robbery of Flynn in Florida as well as a huge amount of testimony as to the chemically testing, packaging and distribution of the Flynn cocaine. This testimony filled hundreds of pages of the instant transcript and comprised, in toto, the overt acts alleged to have taken place in furtherance of the alleged conspiracy. There was no evidence connecting the Appellant to the Flynn incident. However, Appellant was forced to sit before the jury while testimony on the Flynn matter slowly and inexorably accumulated.

For two days, tape recorded conversations dealing with the Lucas-Mengrone "rip off" were played before the jury. The Government alleged that these tapes were evidence of an actual narcotics deal. Mr. Lefcourt, Attorney for Defendant/Appellant, Guerra, argued that these tapes represented a rip-off of money and that the conversations involving narcotics were simply in furtherance of this rip-off.

In fact, Rossi did talk Mengrone into parting with $30,000 while never delivering narcotics to Mengrone or Lucas.

In any event, the spill-over prejudice resulting to the Appellant, THOMPSON, as a result of these tapes being played was substantial. This prejudice was evident in the initial stages as the tapes were first played, but ever more so in the insistent and seemingly perpetual manner in which the actual voices of other Defendants rained an endless tirade of violence, threats, talk of kidnapping, murder and narcotics deals upon the jury's ears.

It was during the playing of these tapes if not during the testimony of the Flynn robbery that the accumulation of prejudicial testimony against the Appellant, THOMPSON reached its peak.

It was at this point that the Court had a duty to order a severence as to the Appellant, THOMPSON.

Yet, when Mr. Goldberger, Attorney for the Defendant, Phillip Cimmino, moved for a severence on the grounds that the Lucas-Mengrone tapes created spillover prejudice as to his client, the Trial Court stated:

> "Without each of your rising to make it, I will assume that the Motion (made by Mr. Goldberger, supra.) is made on behalf of all the Defendants who have not been mentioned on the tapes."
>
> Mr. W. Richman: "Thank you, your Honor."
>
> THE COURT: "The Motions are denied."
> (Tr. P. 1339)

The marshalling of evidence by the Trial Judge in the instant case increased the prejudice which had accumulated against the Appellant, rather than alleviating it.

The Court stated to the jury, while presenting its summary of Louis Guerra's defense that:

> "Louis Guerra contends that all of Rossi's testimony about drug-dealing is false, that Rossi's forte was robbing and stealing; that the wiretapped conversations which you heard do not involve any drugs but involve a robbery of Lucas, Matthews and Peter Mengrone. . ." (Tr. P. 2777)
>
> and
>
> "If you conclude as to the Defendants that the wiretapped conversations you heard related to something else, that it had nothing to do with narcotics, as the Defendants contend, then obviously these conversations cannot be considered by you in furtherance of the conspiracy alleged here." (Tr. P. 2752)

In fact, Mr. Lefcourt, Attorney for Guerra, did not argue that the wiretapped conversations do not involve any drugs, i.e. that the conversations did not make reference to drugs.

Mr. Lefcourt argued instead, that these wiretapped conversations represented a "scam, if you will, a rip-off of money, with no narcotics ever, ever transferred."

Thus, the argument advanced in behalf of Guerra stated, in effect, that while narcotics may have been mentioned by the parties involved in the wiretapped conversations, the intent of the purported procurer of the narcotics, Rossi, was from the very beginning to rip-off Mengrone. That Rossi never intended to deliver narcotics.

However, the statement of the Trial Court that Guerra argued that the conversations did not involve any drugs must have branded Guerra, as well as the Appellant and all other Defendants

sitting before the jury, as straining, if not breaking, the bonds of credibility.

Furthermore, the Trial Court gave the "all or nothing" charge condemned in United States v. Borelli, (2nd Cir. 1964) 336 F. 2d 376 when it charged that the jury must acquit if they found more than one conspiracy existed, but failed to charge that the jury could find a multiple conspiracy as to one or more Defendants while finding a single conspiracy as to the others.

This Court, in the Borelli case stated on Page 386, Footnote 4 that:

> "In cases like this the existence of a conspiracy is not usually in serious question; the controverted issues are the various Defendants' connections with it. The Court always charges that this must be determined on an individual basis; we hold only that where the evidence is ambiguous as to the scope of the agreement made by a particular Defendant and the issue has practical importance, the Court must appropriately focus the jury's attention on that issue rather than allow it to decide on an all or nothing basis as to all Defendants."

Thus, the Trial Court failed to adequately distinguish among the Defendants.

The Appellant, RAYMOND THOMPSON, was entitled to a severance and the failure of the Trial Court to grant one, as to him, resulted in substantial prejudice to him, deprived him of a fair Trial and should result in his conviction being reversed.

POINT IV

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 28 (i) APPELLANT, THOMPSON, RESPECTFULLY INCORPORATES BY REFERENCE ANY ARGUMENTS RAISED BY CO-COUNSEL INSOFAR AS THEY ARE APPLICABLE TO HIM

CONCLUSICN

FOR THE ABOVE REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED; IN THE ALTERNATIVE APPELLANT SHOULD RECEIVE AN INDIVIDUAL NEW TRIAL.

Respectfully submitted,
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U.S. v. Thompson-Barnhart

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 9 day of June, 19 75 at No. U.S. Courthouse, FFC deponent served the within Brief upon U.S. Attorney the appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 9 day of June 1975

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1973